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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

PALADIN ENTERPRISES, INC.,
Petitioner,

v.

VIVIAN RICE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF *AMICI CURIAE* ABC, INC., THE E.W. SCRIPPS COMPANY, MEDIA GENERAL, INC., MEDIA PROFESSIONAL INSURANCE, INC., NATIONAL ASSOCIATION OF BROADCASTERS, NATIONAL BROADCASTING COMPANY, INC., NEWSPAPER ASSOCIATION OF AMERICA, PRIMEDIA INC., RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, SOCIETY OF PROFESSIONAL JOURNALISTS, THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION, VIACOM INC. AND THE WASHINGTON POST COMPANY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the First Amendment provide a complete defense for a disseminator of information where one of the many recipients of the information engages in criminal or tortious conduct, allegedly after consulting the information, even though the disseminator did not specifically target the wrongdoer or specifically advocate the harmful conduct, which was not committed imminently following either the dissemination or the receipt of the information?

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STATEMENT OF INTEREST[1]

Amici curiae are broadcasters, publishers, a non-profit First Amendment Center, and other similarly interested organizations and associations, all of whom share a strong belief in the right of dissemination of a wide range of information and ideas to the public. Amici are well aware of the ongoing possibility that the information and ideas disseminated by them and others could be misinterpreted by a member of their audience at some future time and place, thereby leading that individual to engage in some form of antisocial conduct. A fundamental aspect of our society, however, has always been the long tradition of encouraging -- at times, simply tolerating -- and protecting the free

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[1]Petitioner and respondents have consented to the filing of this amicus brief. Letters evidencing their consent are being filed concurrently with this brief. Pursuant to Supreme Court Rule 37.6, amici curiae state that their counsel authored this brief and no party other than amici curiae made any monetary contribution to the preparation or submission of this brief. A description of each amicus curiae can be found in the Appendix.

flow of information and ideas, regardless of the savoriness of the message transmitted.

While people who live in a society afflicted with growing violence do not condone the content of petitioner's book, amici can see no principled distinction between constitutional protection for the type of information found in the book and protection for identical or similar information found in a vast array of books, periodicals, music, electronic communication, and video programming. The history of First Amendment jurisprudence in the United States repeats a theme that echoes once again in this lawsuit: from the unscrupulous rag in *Near v. Minnesota*, 283 U.S. 697 (1931), to the vulgarities in *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), and the flag burning in *Texas v. Johnson*, 491 U.S. 397 (1989), it is most often the speech at the fringes of American life that defines the freedoms for those at the center.

Amici urge the Court to recognize the serious and substantial harm that will be inflicted on protected communication by a decision that subjects the information in a book, regardless of how palatable its content, to general judicial scrutiny, in contrast to the long tradition of granting blanket protection to speech of all stripes, except in very narrow circumstances not present here. Thus, it is critical that the Court grant the petition and review this matter at this important juncture, for allowing this lawsuit to survive, even for a brief time, will disturb decades of First Amendment jurisprudence and jeopardize free speech from the periphery to the core.

STATEMENT OF THE CASE

While amici refer the Court to the petition for a detailed recitation of the facts, the essence of this case is quite simple and uncontroverted, and compels the result reached by the district court below.

In 1983, petitioner Paladin Enterprises, Inc. published the book *Hit Man: A Technical Manual for Independent Contractors*. Since 1983, the book has been marketed, sold and distributed through bookstores, mail order and even on the Internet, and is available in various libraries across the country. The parties agree for present purposes that over the fifteen years that the book has been available, it has been marketed and sold to the general public and specifically to, among others, authors seeking information to aid in the writing of books about crimes and criminals, law enforcement officials desiring information concerning means and methods of committing crimes, persons who enjoy reading about the commission of crimes, and criminologists. More than 13,000 copies of the book have been sold to date.

In 1991, some eight years after the Paladin book was published, Lawrence Horn conspired with career criminal and convicted felon James Perry to murder Horn's ex-wife and quadriplegic son, and collect insurance proceeds and a substantial sum held in trust for the son from the accident leading to his condition. While in the midst of planning their intended crime, in January 1992 -- almost ten years after the Paladin book's publication -- James Perry ordered a copy of the book from a mail-order catalog. Approximately fifteen months later, on March 3, 1993, Perry murdered Horn's ex-wife, son, and the son's nurse in Montgomery County, Maryland, pursuant to his 1991 agreement with Horn.

Following the successful trials and convictions of Perry and Horn, relatives and the estates of the victims instituted this action in the United States District Court for the District of Maryland, claiming that Paladin should be held civilly liable for "aiding and abetting" the crime committed by Perry and Horn based on the contention that Perry had purchased and allegedly consulted Paladin's book prior to committing his murder for hire, even though the purchase was made after the criminal scheme had been consummated and close to ten years after the book's publication. Moreover, respondents concede for present purposes that at no time prior to the commission of this gruesome crime did

Paladin have knowledge of the 1991 conspiracy between Perry and Horn to commit these crimes, and certainly not at the time of publication in 1983, or sale to Perry in 1992. Indeed, Horn's son was born after the Paladin book was first published and sold.

The Paladin book, while personally distasteful to amici, does not specifically advocate that the reader should engage in murder for hire. At its outset, the book espouses the view that "[t]here are many, many instances when atrocities are committed that the law will not or cannot pursue [a]nd other times when the law does its part but the American legal system is so poor that *real* justice is not served." *Id.* at ix. According to the author, "*In those cases*, as in cases of personal revenge and retribution, a man must step outside the law and take matters into his own hands." *Id.* (emphasis added) What then follows is a detailed story, told in the third person, of a mythical hit man in action, no different than innumerable such accounts in literature. Thereafter, the author provides a step-by-step approach to how one might commit a murder.

At no point, however, does the book address itself specifically to Perry and Horn, or advocate murdering one's family to collect insurance proceeds and trust funds, as Horn intended. Indeed, the instances in which the author might condone murder are entirely inconsistent with the reasons for Perry and Horn's actions.

In light of all of these deficiencies, shortly after this case was filed, petitioner moved for summary judgment, asserting that the First Amendment provides a complete defense against liability based upon settled authority from this Court and others around the country. To permit the district court to resolve this matter early in the proceedings and before the parties engaged in costly and protracted discovery, the parties entered into a series of stipulations for purposes of the motion only, to eliminate any factual issues that might constrain the court from ruling as a matter of law.

Following well-settled precedent of this Court and others, the district court granted summary judgment, holding that a publisher may not be held liable for the criminal acts of a reader. While recognizing that Maryland law provides a cause of action for "aiding and abetting," the court, relying on *Brandenburg v. Ohio*, 395 U.S. 444 (1969), found that the First Amendment bars recovery because the petitioner's publication and sale of the book at issue did not and could not constitute incitement to imminent lawless action.

On November 10, 1997, the United States Court of Appeals for the Fourth Circuit reversed, focusing its opinion principally on the admittedly disturbing facts and the parties' stipulations, although without finding that the Paladin book could constitute incitement to imminent lawless action.

SUMMARY OF ARGUMENT

For the first time in over a quarter century, this Court's seemingly settled safeguards for free expression have been placed in doubt by a single court of appeals decision. The holding of the court of appeals in this case is as frightening as it is unprecedented.

The Court should grant a writ of certiorari for two fundamental reasons. First, the decision of the court of appeals that the First Amendment does not provide a complete defense to liability in the absence of incitement to imminent lawless action constitutes a grave departure from well-settled jurisprudence established by this Court that threatens all but the most placid speech in our society. Moreover, the Fourth Circuit's decision represents a departure from the other courts in this country who have recognized a complete First Amendment defense in this context. Second, unless the judgment of the court of appeals is corrected, it will subject publishers, authors, broadcasters and musicians, as well as all other disseminators of all but the most benign form of information and ideas, to the serious risk of harassment and potential litigation from engaging in expressive

activity that is fundamental to our free society and has historically been accorded the highest level of protection.

It has been a usual and customary practice for the mainstream media and similarly interested organizations to intervene as amici in cases involving offensive speech to provide courts with a perspective on the First Amendment protections implicated. Accordingly, amici's participation in this case is utterly unsurprising, not "breathtaking." *Cf. Rice v. Paladin Enters.*, 128 F.3d 233, 265 (4th Cir. 1997). For these reasons, amici have found it essential at every step of these proceedings to inform this Court and the courts below of the importance of the issues at stake to more than simply the parties to this lawsuit.

REASONS FOR GRANTING THE WRIT

I. THE JUDGMENT OF THE COURT OF APPEALS REPRESENTS A SERIOUS DEPARTURE FROM WELL-SETTLED LEGAL DOCTRINE GUARANTEEING PROTECTION TO PROVOCATIVE SPEECH.

The district court correctly recognized the extraordinarily limited circumstances in which speech can result in liability in our society, noting that "[t]he First Amendment bars the imposition of civil liability on Paladin unless Hit Man falls within one of the well-defined and narrowly limited classes of speech that are protected by the First Amendment." *Rice v. Paladin Enters.*, 940 F. Supp. 836, 840-41 (D. Md. 1996) (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942)). The district court correctly concluded that the only exception into which the allegations of this case could arguably fit is the one articulated by this Court in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), for words likely to incite imminent lawless action. Remarkably, however, the court of appeals found that the speech at issue here was not entitled to complete immunity from liability even though that court was unable to find that the actions of the petitioner constituted incitement to imminent lawless action.

A. The Fourth Circuit's Decision Disregards Settled Jurisprudence of this Court on an Issue Fundamental to Our Society.

This Court has established, in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), *Hess v. Indiana*, 414 U.S. 105 (1973), and *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), a very high standard for judging speech that is alleged to trigger or energize unlawful or tortious conduct. The judgment of the court of appeals in this case flagrantly disregards that standard. In its stead, the Fourth Circuit substitutes a dangerously diluted view of free speech, suggesting that "the cloak of the First Amendment envelops critical, but abstract, discussions of existing laws, but lends no protection to speech which urges the listeners to commit violations of current law." 128 F.3d at 246.

What *Brandenburg* expressly declares, quite simply, is that dangerous speech can be punished only when it amounts to "advocacy . . . *directed to inciting or producing imminent lawless action and is likely to incite or produce such action.*" 395 U.S. at 447 (emphasis added). Four years later, in *Hess*, this Court reiterated this narrow exception to the otherwise complete protection of speech in this area. For the same reasons that the Paladin book deserves protection, this Court held that the threatening speech in question was constitutionally protected. The Court determined that because the challenged statement "was not directed to any person or group of persons, it cannot be said that [the speaker] was advocating, in the normal sense, any action." 414 U.S. at 108-09. Accordingly, the Court found that "since there was no evidence, or rational inference from the import of the language, that the words were intended to produce, and likely to produce, *imminent* disorder, those words could not be punished . . . on the ground that they had a 'tendency to lead to violence.'" *Id.* (emphasis in original).

Moreover, this Court's subsequent decision in *Claiborne Hardware* eliminated any doubt about the application of the *Brandenburg-Hess* test to claims of civil liability. In *Claiborne*

Hardware, this Court held that the type of allegedly dangerous speech that was protected from criminal sanction enjoys the same protection from suits for damages, without regard to the seriousness of the harm alleged to have been caused. 458 U.S. at 932.

This Court's decisions in *Brandenburg* and its progeny make clear that a disseminator of information cannot be liable for the acts of a recipient separated from the disseminator by time and space, and to whom the disseminator did not specifically advocate a particular course of imminent conduct. Unquestionably, this Court's prior decisions in this area preclude a finding of the requisite incitement on the part of a publisher of a mass-distributed book that does not advocate that a particular individual commit a specific act against an identified target. Indeed, even in the face-to-face inflammatory encounters with the receptive audiences in *Brandenburg*, *Hess*, and *Claiborne Hardware*, the Court determined that the necessary level of "incitement" was lacking. When both time and space separate speaker and listener -- or publisher and reader -- as they do here, not only does such a finding of incitement become impossible, but also a finding of "imminence" becomes conclusively problematic. Clearly that must be the case when more than a decade separates the identified speech from the conduct in question, and more than a year passes between the sale of a book and the act of an individual claimed to have referenced that book. Were it any other way, any disseminator of information would face unlimited and open-ended liability for eternity for the unanticipated actions of any recipient who chose to act on the information obtained at some future time. Such a rule of law would wreak havoc on the free flow of ideas that has traditionally been accorded protection from liability in our society.

B. The Decision of the Court of Appeals Creates a Clear Conflict Among the Circuits on a Fundamental Issue of Constitutional Law.

Until the decision of the Fourth Circuit in this case, the courts in this country had uniformly followed this Court's pronouncements in the *Brandenburg* line of cases by protecting a disseminator of information from liability for the conduct of a recipient, regardless of the tastelessness, dangerousness, or unpatriotic nature of the content of the information, or the subsequent injury sustained.

That precept is most clearly reflected in the Fifth Circuit's holding in *Herceg v. Hustler Magazine*, 814 F.2d 1017 (5th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988), in which a fourteen-year-old boy caused his own death by closely following a magazine's step-by-step instructions for the bizarre act of autoerotic asphyxiation. Though the behavior that the magazine's instructions induced was unquestionably dangerous, likely criminal and clearly fatal, the court of appeals joined other courts in rejecting the plaintiff's attempt to impose liability upon the publisher. As the court succinctly explained in its refusal to hold the publisher responsible,

> The constitutional protection accorded to the freedom of speech and of the press is not based on the naive belief that speech can do no harm but on the confidence that the benefits society reaps from the free flow and exchange of ideas outweighs the costs society endures by receiving reprehensible or dangerous ideas.

814 F.2d at 1019.

In reaching its conclusion, the *Herceg* court rejected the very bases underlying the Fourth Circuit's misguided ruling below. The decedent's family had argued that the magazine's step-by-step instructions constituted actionable incitement because of the instructions' focused nature and lethal quality. The court

flatly rejected that claim, holding that "liability cannot be imposed on Hustler on the basis that the article was an incitement to attempt a potentially fatal act without impermissibly infringing upon freedom of speech." 814 F.2d at 1021. Moreover, the Fifth Circuit flatly refused to accept a less stringent constitutional standard for a publication "involving non-political speech that has actually produced harm" in striking contrast to the Fourth Circuit below. *Id.* at 1024. According to the court in *Herceg*, "If the shield of the First Amendment can be eliminated by proving after publication that an article discussing a dangerous idea negligently helped bring about a real injury simply because the idea can be identified as 'bad', all free speech becomes threatened." 814 F.2d at 1024.[2]

The Fifth Circuit is hardly alone in its conviction that publishers, broadcasters, and other disseminators of information are not civilly liable for the aberrant conduct of readers, viewers and other recipients. *See, e.g., Yakubowicz v. Paramount Pictures*, 404 Mass. 624, 536 N.E.2d 1067 (1989); *McCollum v. CBS, Inc.*, 249 Cal. Rptr. 187 (Ct. App. 1988); *DeFilippo v. NBC, Inc.*, 446 A.2d 1036 (R.I. 1982); *Smith v. Linn*, 587 A.2d 309 (Pa. 1991); *Walt Disney Prods., Inc. v. Shannon*, 276 S.E.2d 580 (Ga. 1981); *High Ol' Times v. Busbee*, 621 F.2d 141 (5th Cir. 1980); *see also United States v. Dahlstrom*, 713 F.2d 1423, 1428 (9th Cir. 1983) (reversing convictions for aiding and abetting where all but one defendant "merely instructed an audience" and did not "actually assist in the preparation of any individual tax return"), *cert. denied*, 466 U.S. 980 (1984). In each of these cases and others, the courts rejected liability of a disseminator of information despite the same type of claimed nexus between dangerous information and harmful conduct alleged in this action.

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[2]Moreover, any doubt about the clear conflict between the Fifth Circuit's holding in *Herceg* and the Fourth Circuit's determination below cannot withstand a comparison of the dissenting opinion in *Herceg* with the decision below. *See* 814 F.2d at 1028, 1030 (espousing a "limited first amendment protection" and the availability of recourse under state tort law).

In each case, the court refused to apply a lesser standard of First Amendment protection to material that was clearly not political, and could at most claim social value as entertainment. Every one of these courts recognized, as did the Fifth Circuit in *Herceg*, that "the benefits society reaps from the free flow and exchange of ideas outweigh the costs society endures by receiving reprehensible or dangerous ideas." 814 F.2d at 1019. The judgment in the instant case represents a sharp break with this uniform line of precedent, and thus creates a clear conflict.

The Fourth Circuit unconvincingly attempted to liken this case to *United States v. Freeman*, 761 F.2d 549 (9th Cir. 1985), *cert. denied*, 476 U.S. 1120 (1986), in which the Ninth Circuit recognized, as one must, that not all speech is fully protected. If one directly counsels a criminal, or directly participates in a criminal conspiracy, or directly aids and abets the commission of a specific crime, a free speech defense based simply on the fact that the participation involved communicating with co-criminals will not and should not avail.

Yet the circumstances in which speech-based convictions have been sustained differ significantly from the circumstances here. Those cases have involved instructions targeted for and conveyed exclusively to a closed and structured audience -- not the general publication of books to the entire reading public.[3] That difference is crucial. As then-Judge Kennedy recognized in *Freeman*, a conviction (for "aiding and abetting") would not accord with the First Amendment where "the purpose of the speaker or the tendency of his words are directed to ideas or consequences remote from the commission of a criminal act." 761 F.2d at 551.

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[3]Indeed, in *Freeman*, there was evidence that the defendant directly participated in the review and preparation of false tax returns; nevertheless the Ninth Circuit reversed the conviction on twelve of fourteen counts because the jury had not been allowed to consider a First Amendment defense to the aiding and abetting charges. *See* 761 F.2d at 551-52.

Such is precisely the case with the Paladin book here. Unlike the detailed and targeted instructions in *Freeman*, petitioner's book addresses a general audience on matters far beyond the potentially harmful use to which that material was allegedly applied by a single aberrant reader.

If someone were to offer a specially tailored service for would-be assassins -- compiling all the specific data pertaining to a planned crime, and returning an individualized scenario for its optimal execution -- such conduct might constitute aiding and abetting beyond the protection of the First Amendment. The "designer" might then be a knowing and potentially culpable partner in a criminal enterprise. No defense based on the use of words would invoke a First Amendment interest because there would be "[no] evidence ... that the purpose of the speaker or the tendency of his words were directed to ideas or consequences remote from the commission of a criminal act." *Id.* Such a situation is so manifestly different from what the petitioner has done in this case as to make clear the inapplicability of cases like *Freeman*. Free speech principles do not protect genuine "aiding and abetting" any more than they shield criminal conspiracies. They do, however, shield a speaker to a general audience from liability occasioned by the unknown plans and future acts of an isolated member of that audience.

II. UNLESS CORRECTED, THE JUDGMENT OF THE COURT OF APPEALS WILL EXPOSE ALL DISSEMINATORS OF INFORMATION AND IDEAS TO THE GRAVE RISK OF HARASSMENT, UNWARRANTED LITIGATION, AND UNCONSTITUTIONAL LIABILITY.

The decision of the court of appeals opens a dangerous door, subjecting those who write or speak, publish or broadcast to potential liability simply from the unintended consequences of their words. If the bare possibility exists that the victim of a criminal or tortious act might trace that act to a book and hold the author or publisher -- rather than the criminal -- liable for the harm, then

all but the most benign forms of expression would be potentially at risk. Moreover, regardless of the ultimate merits of such a case, the speaker would face the prospect of costly and burdensome litigation, however clear the eventual outcome might be.

A. The Well-Recognized Need for Early Disposition of Legal Challenges to Speech is Dangerously Undermined by the Fourth Circuit's New Standard.

As this Court has observed, fear of litigation costs "must inevitably cause publishers to steer . . . wider of the unlawful zone . . . creat[ing] the danger that the legitimate utterance will be penalized." *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967) (internal quotations omitted). Moreover, "[t]he very possibility of having to engage in litigation, an expensive and protracted process, is threat enough to cause discussion and debate to steer far wider of the unlawful zone thereby keeping protected discussion from public cognizance." *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 52-53 (1971) (plurality opinion) (internal quotation omitted).

Based on this long-held concern that either threatened or actual protracted litigation could seriously stifle speakers spectrum-wide, courts have traditionally recognized that

> [i]n the First Amendment area, summary procedures are ... essential. For the stake here, if harassment succeeds, is free debate .... The threat of being put to the defense of a lawsuit ... may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself.

Washington Post v. Keogh, 365 F.2d 965, 968 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967). Thus, courts of appeal nationwide have encouraged summary adjudication in First Amendment cases whenever possible. *See, e.g., Dorsey v. National Enquirer, Inc.*, 973 F.2d 1431, 1435 (9th Cir. 1992);

McBride v. Merrell Dow & Pharms., Inc., 717 F.2d 1460, 1466-67 (D.C. Cir. 1983); *Schuster v. U.S. News & World Report, Inc.*, 602 F.2d 850, 855 (8th Cir. 1979); *Anderson v. Stanco Sports Library, Inc.*, 542 F.2d 638, 641 (4th Cir. 1976); *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858, 864-65 (5th Cir. 1970).

The Fourth Circuit's newly articulated standard hampers the ability of speakers to achieve summary disposition in the future. Instead of affording the historic presumption of protection, the Fourth Circuit now requires an examination by judge or jury of the speaker's actual intent. Indeed, the court would appear to allow a fact-finder to infer intent from the content of the publication itself, an unprecedented practice that will open the floodgates to challenges across the spectrum of speech. Moreover, the court of appeal's apparent obsession with the parties' stipulations and dismissive assertion that they were made "[f]or reasons that are here of no concern to the court," demonstrates that the court used the very vehicle designed to set up the case for judgment on purely legal grounds as a basis for denying the relief sought. The stipulations were made solely for the purpose of allowing the courts below to dispose of this case as a matter of law. Contrary to the Fourth Circuit's apparent impression, these stipulations certainly did not constitute admissions of facts for purposes of a trial on the merits.

The Fourth Circuit's departure from the longstanding approach for disposing of unmeritorious challenges to protected speech, if left standing, inevitably will lead to greater self-censorship that ultimately will have a significant impact on the marketplace of ideas.

B. Unless Corrected Now, The Fourth Circuit's Decision Threatens Entire Genres Of Expression.

Allowing respondents' claims to continue threatens to unleash a hailstorm of derivative suits on the media as plaintiffs search for deep pockets to avenge real or imagined injuries better

recompensed by perpetrator than publisher. No expression -- music, video, books, even newspaper articles -- will be safe from civil liability. Paladin's book cannot compete for provocative effect with the frightening realism of a modern motion picture, or hope to be as convincing as the reality depicted everyday on television news, in the newspaper, or in a captivating work of fiction or non-fiction.[4]

The number of written works on "lethal" subjects alone is staggering. Crime books, mystery novels, scientific journals and military manuals abound, and -- like Paladin's book -- they can all be used for benevolent purposes, including education, research, or writing. A sampling from *Books in Print* reveals titles ranging from *Assassination: Case Studies*,[5] to *Written in Blood: The Criminal Mind and Method*.[6] There is almost no end to the catalog of works providing information on cheating,[7]

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[4]On this point, through selective quotation, the court of appeals unfairly chastised amici for their filing a brief below. In their brief, amici fairly observed that compared with fiendish fictional depictions of demented acts of murder and torture in such works as the best-selling novel *Silence of the Lambs*, the Paladin book at issue "seems almost avuncular, offering purple prose like, 'Lovingly he begins to assemble his weapon.'" *Compare* 128 F.3d at 254 (criticizing "amici's reckless characterization of the book as 'almost avuncular'") *with* Brief of Amici Curiae in Support of Affirmance in U.S. Ct. of App. 4th Cir. at 8-9. Clearly, the court's contempt for the book colored its perception about anything relating to it, including an amicus brief intended to be helpful in addressing the substantial constitutional issues.

[5]1 *Books in Print: Subject Guide* 677-78 (1995-96).

[6]*Id.* at 2408-12.

[7]*Id.* (*The Arts of Cheating, Swindling, and Murder*).

murder,[8] the mafia,[9] poisons,[10] and nearly every other aspect of crime.[11]

Many of these works are far more explicit than petitioner's book. Consider the mystery-writing handbooks. By comparison, the book at issue here seems downright amateurish alongside this advice from a licensed physician:

> Larger caliber bullets can cause considerable damage to the chest and abdomen because of both the mass and velocity of the bullet. . . .
>
> There are exceptions to this, however. A .22-caliber handgun is often used by the mob for a "hit" when the victim is shot in the head. The bullet will usually not create an exit wound because it lacks the velocity to penetrate the skull a second time; instead, it ricochets around inside the skull and causes considerable brain damage, hemorrhage and death.

Keith D. Wilson, M.D., *Cause of Death: A Writer's Guide to Death, Murder & Forensic Medicine* 103-05 (1992).

Similarly, the petitioner's book's "instructions" for picking a lock seem tame against the practical "tips" contained in another Handbook in which two detectives instruct budding authors that it is easier to break down a door or smash a window than to pick a lock. *See* Mauro V. Corvasce & Joseph R. Paglino, *Modus*

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[8]3 *Books in Print: Subject Guide* 6412-13 (1995-96) (*The Art of Murder*).

[9]*Id.* at 5739 (*Killing for Profit: The Social Organizations of Felony Homicide*).

[10]*Id.* at 7402 & 7403 (*A Handbook for Poisoners*).

[11]A sampling of the titles found in *Books in Print* is contained in the Appendix.

Operandi: A Writer's Guide to How Criminals Work 164-68 (1995). They also offer this insight:

> [L]et's give you an inside tip on what burglars do to give them more time to escape when you arrive home a little earlier than planned. They place small pieces of broken toothpicks in the keyhole after they enter. The reasons for this is your key will not fit into the lock, so you cannot enter your home. The noise that you make trying to open your door will alert our burglar that you are home.

Id. at 165; *see also* Mauro V. Corvasce & Joseph R. Paglino, *Murder One: A Writer's Guide to Homicide* 92 (1997) (describing a method for killing an unsuspecting patron of a public restroom). Other instructional manuals, including publications by manufacturers of explosive devices, are no less "dangerous" in the wrong hands. *See, e.g., Blaster's Handbook* (DuPont Co., 1980); *Explosives and Rock Blasting* (Atlas Powder Co., 1987).[12]

Aficionados of advanced weaponry and army lore consume a variety of military field and training manuals, which carry the same potential for abuse as the petitioner's book. Examples (with Department of Army identifiers) include: *Boobytraps* (FM 5-31) and *Improvised Munitions Handbook* (TM 31-210).[13]

Of course, the silver screen can be as fertile a source for criminal ideas as the printed word. Murder and mayhem are popular cinematic subjects invariably presented in far more provocative and graphic fashion than anything imagined in the

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[12]A more complete list of titles from each of these categories is attached in the Appendix. These titles were all obtained from the Library of Congress.

[13]Ironically, the court below focuses on what it perceives as the dangers the book at issue creates, but at the same time fills its opinion with large excerpts. Under the Fourth Circuit's theory, rather than going to the trouble of purchasing Paladin's book, the industrious criminal can now find the same information in volume 128 of the third series of the Federal Reporter.

book at issue here. For example, *The Mechanic* (United Artists 1972) showcases Charles Bronson teaching Jan Michael Vincent the craft of the contract killer, with detailed steps in the planning and execution of assassinations. *The Godfather* (Paramount 1972) includes details on removing serial numbers from guns, taping the grip and trigger of the weapon to prevent fingerprints, and hiding weapons to avoid detection while being frisked. *On Deadly Ground* (Warner Bros. 1994) features Steven Seagal demonstrating the conversion of an ordinary two-liter soft drink bottle into a silencer. *Marked for Death* (20th Century Fox 1990) showcases techniques for building and test-firing silencers. And, *The Exterminator* (Interstar/AE 1980) demonstrates how to fill hollowpoint bullets with mercury to increase deadly efficiency. These and similar descriptions could fill thousands of pages and hours of film and videotape.

Even journalism -- from the avant-garde to the mainstream -- would not be spared potential liability. In the politically charged 1960's, for instance, *The New York Review of Books* offered its readers front-page instructions on how to make a Molotov cocktail at a time when Molotov cocktails were relatively new to the average American's lexicon. *See New York Review of Books*, Aug. 24, 1967. More recently, *Life* magazine published a technically accurate schematic of a deadly bomb as part of its coverage of airport security. *Life*, March 1989.

Drawing a distinction between the speech in these works and the speech in the book under attack in this lawsuit -- based on the impermissible assessment that petitioner's book provides less "value" to society or is formatted as an "instructional" manual -- is an impossible exercise. Moreover, even if such distinctions could be made in some principled way, the task itself is inimical to our heritage and our laws. *See Pring v. Penthouse Int'l, Ltd.*, 695 F.2d 438, 443 (10th Cir. 1982) ("The First Amendment standards are not adjusted to a particular type of publication or

particular subject matter."), *cert. denied*, 462 U.S. 1132 (1983). As Judge Easterbrook aptly acknowledged:

> Much speech is dangerous. Chemists whose work might help someone build a bomb, political theorists whose papers might start political movements that lead to riots, speakers whose ideas attract violent protesters, all these and more leave loss in their wake. Unless the remedy is very closely confined, it could be more dangerous to speech than all the libel judgments in history.

American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 333 (7th Cir. 1985). Courts have consistently rejected distinctions based on the value or style of speech because constitutional protection

> is not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax. And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing.

Kingsley Int'l Pictures Corp. v. Regents of Univ. of N.Y., 360 U.S. 684, 689 (1959); *Herceg*, 814 F.2d at 1024 (distinguishing types of speech "would not only be hopelessly complicated but would raise substantial concern that the worthiness of speech might be judged by majoritarian notions of political and social propriety and morality").

As Justice Scalia observed, "All government displays an enduring tendency to silence, or to facilitate silencing, those voices that it disapproves." *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 235 (1987) (Scalia, J., dissenting). Permitting this case to continue will engender a new tort against the written word -- a futile exercise in "pigeonholing [that] endangers the pigeon." Laurence Tribe, *American Constitutional Law* §§ 12-18 at 943 (2d ed. 1988).

CONCLUSION

A word, a lyric, a film clip -- these are the living embodiments of our proud heritage of defending the rights of even the most outrageous speaker. They are capable of enriching, entertaining, educating, and -- occasionally -- shocking and horrifying. But, whatever their power, they are incapable of acting. To hold a word or an image jointly responsible for even the most ghastly criminal act diminishes us all, because it means that some valuable speech surely will be chilled in the process.

For the foregoing reasons, amici curiae respectfully urge this Court to grant the petition for a writ of certiorari.

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Appendix

APPENDIX

IDENTITY OF INDIVIDUAL *AMICI*

ABC, Inc., a wholly owned subsidiary of The Walt Disney Company, is a broad-based communications company with significant holdings here and abroad. It operates the ABC Television Network and ten television stations, eight network radio program services and 21 radio stations. It is a major supplier of cable television programming through its interests in ESPN, Lifetime and A&E Television Networks. The Company also publishes seven daily and numerous weekly newspapers, as well as various specialized trade and business periodicals and books. It has significant interests in international broadcast and cable ventures.

The E.W. Scripps Company operates nine large-market television stations; daily newspapers in 16 markets; two television production companies – Los Angeles-based Scripps Howard Productions and Knoxville's Cinetel Productions; United Media, a licensor and syndicator of news features and comics; and Home & Garden Television, a 24-hour cable television network.

Media General, Inc. is the parent company of the publisher of the *Richmond Times-Dispatch* and is an independent, publicly owned communications company based in Richmond, Virginia, with interests in metropolitan newspapers, broadcast and cable television, recycled newsprint production and diversified information services.

Media/Professional Insurance, Inc. is the nation's largest provider of insurance for matter published or broadcast. As such, it is keenly aware of the practical implications of how the First Amendment is applied and interpreted.

The National Association of Broadcasters ("NAB"), founded in 1922, is a non-profit trade association that serves and represents radio and television stations and over-the-air networks.

NAB works to protect and enhance the ability of its members to freely disseminate news, public affairs, entertainment and other programming to the American people.

National Broadcasting Company, Inc. owns, operates and is the licensee, directly or indirectly, of thirteen television stations. The NBC News Division produces two-and-one-half hours of morning news programming (SUNRISE and TODAY) and NIGHTLY NEWS WITH TOM BROKAW each evening. In addition, NBC News produces DATELINE NBC, broadcast four evenings a week, as well as MSNBC, the 24-hour cable news and information network. NBC also broadcasts programming throughout the United States through the NBC television network, the CNBC cable financial news service and the more than 200 NBC-affiliated stations.

The Newspaper Association of America ("NAA") is a nonprofit organization representing the interests of approximately 1,500 newspapers in the United States and Canada. NAA members account for approximately 90 percent of the daily newspaper circulation in the United States and include many non-daily U.S. newspapers. NAA has had a long-standing tradition of advancing the cause of a free press.

Primedia Inc., with 1996 sales of $1.4 billion, is the authoritative source of specialized information in targeted media (specialty magazines, trade magazines, consumer and business information), and education (classroom and workplace learning). Some key brands include *Seventeen, Soap Opera Weekly, American Baby, Modern Bride, Channel One, Weekly Reader, Westcott*, and *World Almanac*.

The Radio-Television News Directors Association is the world's largest professional organization devoted exclusively to electronic journalism. RTNDA represents local and network news executives, educators, students and others in the radio, television and cable news businesses in over thirty countries.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of news editors and reporters dedicated to defending the First Amendment and freedom of information interests of the print and broadcast media.

The Society of Professional Journalists is the largest and oldest membership organization for journalists in the world. The Society is a not-for-profit, voluntary association with a membership of 14,000 professionals and students engaged in every branch and rank of journalism, and for more than 80 years has been dedicated to perpetuating a free press.

The Thomas Jefferson Center for the Protection of Free Expression is a nonprofit, nonpartisan institution in Charlottesville, Virginia, whose sole mission is the safeguarding of freedoms of expression defined in the First Amendment of the United States Constitution. The Center has pursued its mission in several ways, including testimony before legislative and administrative bodies, public statements, and involvement in litigation that may affect free expression. The Center has filed briefs amicus curiae in state and federal courts in a wide variety of cases, seeking recognition and affirmation of freedoms of speech and press.

Viacom Inc. is a diversified entertainment and publishing company with operations in four segments: (1) networks and broadcasting; (2) entertainment; (3) video and music/theme parks; and (4) publishing. The networks and broadcasting segment includes MTV, Showtime, Nickelodeon, and VH1, plus broadcast television stations. The entertainment segment, which includes Paramount Pictures and the partially owned subsidiary Spelling Entertainment Group Inc., produces and distributes theatrical motion pictures and television programming, including news, news/magazine, and talk shows. The publishing segment, which includes Simon & Schuster, MacMillan Publishing USA, and Prentice Hall, publishes and distributes education, consumer, business, technical and professional books, and audio-video software products.

The Washington Post Company ("Company"), a communications company, owns publications and broadcast properties engaged in newsgathering and reporting. The *Washington Post*, a division of the Company, is a daily newspaper of general circulation primarily in Virginia, Maryland, and Washington, D.C. The *Post* has a daily circulation of over 800,000 and a Sunday circulation of over 1.1 million.

Partial List of Available Works
Containing Potentially Provocative Speech

I. Books in Print.

Assassination[14]

Assassination: Case Studies
Assassinations and Executions: An Encyclopedia of Political Violence
Assassins
Encyclopedia of Assassinations
Plots and Conspiracies

Crime and Criminals[15]

The Arts of Cheating, Swindling and Murder
Bloody Business
The Chronicle of Crime: Infamous Felons of Modern History and Their Hideous Crimes
Encyclopedia of Unsolved Crimes
Games Criminals Play: How You Can Profit by Knowing Them
Great Unsolved Crimes
Making Crime Pay
The Mammoth Book of Murder
Medical Reference Guidebook of Crime and Crime Research
Mind of the Murderer
The Signs of Crime: A Field Manual for Police
Why Does Crime Pay?
Writer's Guide to How Criminals Work

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[14]1 *Books in Print: Subject Guide* 677-78 (1995-96).

[15]*Id.* at 2408-12.

Written in Blood: The Criminal Mind and Method

Crime and Criminals -- Bibliography[16]

A Book of Remarkable Crimes

Crime and Criminals -- United States[17]

Cop Talk: True Detective Stories from the NYPD
Love Me, I'm a Criminal, or How to Get Away With Murder
Unsolved: Great Mysteries of the 20th Century
Unsolved Crimes

Detective and Mystery Stories -- Technique[18]

Cause of Death: A Writer's Guide to Death, Murder, and Forensic Medicine
Modus Operandi: A Writer's Guide to How Criminals Work
Police Procedural: A Writer's Guide to the Police and How They Work
Scene of the Crime: A Writer's Guide to Crime Scene Investigation

Homicide Investigations[19]

Homicide Events Reconstruction Guide
How to Solve a Murder: The Forensic's Handbook

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[16] *Id.* at 2412.

[17] *Id.* at 2414-17.

[18] 2 *Books in Print: Subject Guide* 2606-07 (1995-96).

[19] *Id.* at 4461.

Mafia[20]

Blood and Honor: Inside the Scarfo Mob – The True Story of the Most Violent Mafia Family
Body Mike: The Unsparing Exposé by the Mafia Insider Who Turned on the Mob
Contract Killer: The Explosive Story of the Mafia's Most Notorious Hitman
Killing for Profit: The Social Organizations of Felony Homicide
The Mafia
The Mafia Encyclopedia
Men of Dishonor: Inside the Sicilian Mob
Murder Machine: A True Story of Murder, Madness, and the Mafia
Rubouts: Mob Murders in America
Triggerman: The First Volume of John Ragusa's Mafia Secrets

Murder[21]

Anatomy of a Massacre
The Art of Murder
Bitter Blood: A True Story of Southern Family Pride, Madness, and Multiple Murder
Blood Games: A True Account of Family Murder
The Book of Murder
Butcher's Dozen: 13 Famous Michigan Murders
Crimes of Passion
Everything She Ever Wanted: A True Story of Obsessive Love, Murder
Getting Away With Murder: 57 Unsolved Murders with Reward Information
In Cold Blood

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[20]3 *Books in Print: Subject Guide* 5739 (1995-96).

[21]*Id.* at 6412-13.

Lovers, Killers, Husbands, Wives
Marrying the Hangman: A True Story of Privilege, Marriage and Murder
The Murderer and His Victim
Questions and Answers About Murder
Still Unsolved: Great True Murder Cases

Poisoning/Poisons[22]

Crimes Involving Poisons: A Manual for Criminal Investigators
Deadly Doses: A Writer's Guide to Poisons
A Handbook for Poisoners
Handbook of Poisoning
A Handbook of Poisons
Poison! The World's Greatest True Murder Stories
Poisons and Antidotes

II. Instructional Manuals.

Blaster's Handbook (DuPont Co., 1980)
Bombs and Bombings (Charles C. Thomas Publishers, 2d ed. 1996)
The Chemistry and Technology of Explosives (Pergamon Press, 1969)
Dangerous Properties of Industrial Materials (Von Nostrand Reinhold, 8th ed. 1994)
Explosives and Rock Blasting (Atlas Powder Co., 1987)
Handbook of Reactive Chemical Hazards (Butterworth-Heinemann, 5th ed. 1995)

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[22] *Id.* at 7402 & 7403.

Hazardous Chemicals Data
(National Fire Protection Ass'n, 1994)
The Science of Industrial Explosives
(IRECO Chemicals 1974)

III. Army Field Training Manuals.

Boobytraps (FM 5-31)
Demolition Materials (TM 9-1375-213-34)
Disable a Bridge (TC 5-6-16)
Explosive Ordnance Disposal Service and
Unit Operations (FM 9-15)
Explosive Ordnance Reconnaissance (FM 9-16)
Explosives and Demolitions (FM 5-25)
Improvised Munitions Handbook (TM 31-210)
Incendiaries, Unconventional Warfare Devices
and Techniques (TM 31-201-1)
Military Chemistry and Chemical Compounds (FM 3-9)
Military Pyrotechnics (TM 9-1370-203-20&P)
Special Forces Operational Techniques (FM 31-20)
U.S. Army Military Explosives (TM 9-1300-214)

IV. Film.

The Killers (1946)
Kiss of Death (1947)
Suddenly (1954)
Murder, Inc. (1960)
The Killers (1964)
The Liquidator (1966)
The St. Valentine's Day Massacre (1967)
The Brotherhood (1968)
The Assassination Bureau (1969)
The Mechanic (1972)
The Valachi Papers (1972)
Scorpio (1972)
The Day of the Jackal (1973)
The Man with the Golden Gun (1974)

94 and 44/100 Percent Dead (1974)
Mr. Majestyk (1974)
The Eiger Sanction (1975)
Three Days of the Condor (1975)
Brass Target (1978)
The Big Sleep (1978)
Buddy Buddy (1981)
Prizzi's Honor (1985)
Wild Geese II (1985)
Pulp Fiction (1994)